

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ELSIE M SCHMIDT-HUSEMANN
Claimant

APPEAL NO. 09A-UI-17560-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT PIZZA CO
Employer

**Original Claim: 10/25/09
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated November 13, 2009, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on January 6, 2010. The claimant participated. The employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Elsie M. Schmidt-Husemann and Claimant's Exhibits A through D.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was employed at the Oscar Mayer Plant located in Davenport, Iowa. She was initially hired on March 1, 2000, and during her tenure with the employer, was a production worker. The claimant was terminated on October 23, 2009, for excessive absenteeism.

The incident that led to the claimant's termination occurred on October 17, 2009. The claimant was sick and, due to her illness, called in after the start of her shift to indicate that she would be late. The claimant did come to work that day and worked half of her shift. The claimant had also left early on September 19, 2009, due to sickness. She had informed her supervisor before leaving.

The illness in question was depression and the claimant had approved intermittent Family Medical Leave (FMLA) for this condition. The employer had approved this intermittent leave on March 3, 2009. The day the claimant left early was a Saturday and she was unable to see her health care provider, since his office was closed. She was suffering from symptoms of depression that made it difficult for her to work, which is why she notified her supervisor that she was leaving early on September 19, 2009.

The other absences that the employer took into account all occurred in 2008. In each case, the claimant's absences were due to illness or approved personal time off.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

There is no evidence of misconduct in this case. The claimant's absences were all due to personal illness or approved personal time off. The majority of the claimant's absences took place in 2008, which is too remote in time. The final two incidents were both attributable to personal illness as well, for which the claimant had approved intermittent FMLA leave. The

employer did not participate in the hearing. There is no evidence from the employer to show misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated November 13, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw